In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 999

JOSEPH DELMAN AND JEANETTE DELMAN, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners filed a petition for redetermination of income tax deficiencies for the years 1960 and 1961 in the Tax Court 103 days after respondent mailed a deficiency notice (Pet. 6). The Tax Court granted respondent's motion to dismiss on the jurisdictional ground that the petition was filed after the 90-day period allowed by Section 6213 of the Internal Revenue Code of 1954 (Pet. 13a, 25a–26a). At issue here is the Tax Court's denial of petitioners' cross-motion, which had also sought dismissal of the petition for lack of jurisdiction, but on the alternative ground that the deficiency notice was allegedly mailed to an address other than the one which petitioners claim was

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their "last known address" within the meaning of Section 6212 of the Code, and was therefore invalid (Pet. 13a, 19a, 25a–26a).

The deficiency notice was sent by certified mail on December 23, 1964, and was addressed to petitioners in care of their accountant, Edward Goodman. A copy was sent by ordinary mail, on the same day, to petitioners' attorney, Martin D. Cohen. Both the accountant and the attorney received the respective notices on December 24, 1964. Goodman mailed the original to Cohen on the same date that he received it, and Cohen, in turn, received the original on December 28, 1964. On the latter date Cohen notified petitioner Joseph Delman of the deficiency notice by telephone. Cohen forwarded a copy of the deficiency notice to petitioners during the week of December 28, 1964, and they received it on January 4, 1965. On April 5, 1965, petitioners filed their petition with the Tax Court (Pet. 1a–4a, 18a–19a).

Both courts below found as a fact that under the circumstances the deficiency notice had been mailed to petitioners' last known address (Pet. 5a, 25a). Those findings are not clearly erroneous and should not be the subject of further appellate review.

The facts demonstrate that petitioners had two addresses, both of which were known to the Commissioner at the time the deficiency notice was mailed. One of these addresses was in care of Goodman, their accountant, in Newark, New Jersey, which the 1961 income tax return listed as their "home address" (Pet. 13a–14a). The other was petitioners' residence in Elkins Park, Pennsylvania, to which they had

moved late in 1961. On June 2, 1964, they gave respondent a power of attorney which gave Messrs. Cohen and Goodman power of attorney in connection with any federal tax matter, with full authority "to * * * receive * * * all documents * * *" and, further, requested the Treasury Department to send to Cohen a copy of all communications relating to petitioners' federal tax matters (Pet. 16a). This record contains ample support for the finding below that respondent acted reasonably in mailing the deficiency notice to petitioners in care of their accountant's address with a copy to their attorney, since, as the courts below reasoned, the course of dealings between respondent, petitioners, and their representatives indicated petitioners' preference that communications concerning their taxes be mailed in such manner rather than to petitioners' residence in Elkins Park (Pet. 4a–5a, 24a).[1]

[1] The practical problems confronting both the Commissioner and taxpayers in notice cases are exemplified in *D'Andrea* v. *Commissioner*, 263 F. 2d 904 (C.A. D.C.), one of the cases petitioners contend to be in conflict with the decision here (Pet. 8–9). Had the Commissioner notified petitioners in the manner they here assert to be proper, they might now be seeking a determination that the notice was invalid because it was not mailed by registered mail to the accountant, since *D'Andrea* held fatal the failure of the Commissioner to honor a direction in a power of attorney to send any deficiency notice to the taxpayer's attorney.

The Court of Appeals stated that it would have sustained the decision of the Tax Court on any of three alternative grounds. The two other than the factual determination that the notice of deficiency was sent to petitioners' "last known address" were: (1) Section 6212(b)(1) is inapplicable to the instant case; and (2) even if the notice were not mailed to petitioners' last known address and this were required by Section 6212(b)(1), the instant mailing was not so deficient as

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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to bar the Tax Court's jurisdiction (Pet. 5a). Had the result below rested solely on these two postulates, petitioners' assertion (Pet. 8–9) of a conflict with the holdings of other circuits might well have been meaningful. However, resolution of these alternative questions would not affect the outcome of petitioners' case, and is therefore not appropriate here.

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